



1 as neither federal criminal charges nor an appeal is currently pending. Second, assuming that a  
2 notice of appeal is filed prior to June 4, 2008, Mr. Arias-Ordonez is not a flight risk nor a danger  
3 to the community. Although unstated by the government in its motion for detention, the burden of  
4 proof lies squarely on the government to detain Mr. Arias-Ordonez under 18 U.S.C. § 3142 on  
5 these grounds, and the presumption is in favor of the defendant's release. As the government has  
6 not met its burden to show that the presumption for release under 18 U.S.C. § 3142 should not  
7 apply, the Court should deny its motion for detention pending appeal.

8 Further detention of Mr. Arias-Ordonez would also be a miscarriage of justice. At this  
9 point, the case against Mr. Arias-Ordonez before this Court is closed. He has already spent over  
10 six months in custody since his arraignment on November 21, 2007. Had Mr. Arias-Ordonez  
11 been convicted of the charged offense under 18 U.S.C. § 1326, the government has assessed his  
12 applicable Guideline range as 15-21 months. Factoring in a standard "good time" assessment as  
13 calculated by the BOP (15% of the sentence), and assuming that Mr. Arias-Ordonez theoretically  
14 received the benefit of a low-end Guideline sentence, Mr. Arias-Ordonez would have only spent  
15 12 3/4 months in BOP custody had he been *convicted* of the charge at hand – only an additional 6  
16 and a half months. The government's proposal of detention pending appeal would accordingly  
17 result in Mr. Arias-Ordonez' detention for a longer period than his original Guideline range calls  
18 for. Despite knowledge of this fundamentally unfair result, the government seeks Mr. Arias-  
19 Ordonez' detention in the face of just alternatives. In addition to the factors under 18 U.S.C. §  
20 3142, the Court should also reject the government's motion for detention under general principles  
21 of due process and the need for fundamental fairness in the criminal conviction process.

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**ARGUMENT**

**I. Both the Factors Under 18 U.S.C. § 3142(g) And General Due Process Considerations Should Be Considered by This Court in Assessing the Government's Motion for Detention**

As a legal matter, Mr. Arias-Ordonez concurs with government counsel that the Court should weigh the factors listed under 18 U.S.C. § 3142 when considering whether the government's motion for detention pending appeal under 18 U.S.C. § 3731 should be granted. *See* 18 U.S.C. § 3143(c). This assumes, however, that an appeal is active. As of now, there is no notice of appeal in this case, and no appeal pending. As such, as a technical matter, 18 U.S.C. § 3143(c) does not yet apply. Given the lack of any charges pending against Mr. Arias-Ordonez, as well as the lack of any notice of appeal, this Court does not have jurisdiction to detain Mr. Arias-Ordonez. Accordingly, he should be released from federal custody forthwith.

Assuming that, prior to the hearing, the government actually files a notice of appeal, Mr. Arias-Ordonez will proceed herein with the § 3142 analysis. The straight text of 18 U.S.C. § 3142 indicates a presumption for pretrial release. *See* 18 U.S.C. § 3142(a)-(c); *United States v. Salerno*, 481 U.S. 749 (1987). "Only in rare circumstances should release be denied." *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985)(citations omitted). "Doubts regarding the propriety of release should be resolved in favor of the defendant." *Id.* (citations omitted). "The right to bail should be denied only for the strongest of reasons." *Id.* at 1407 (citations omitted). The burden of proof for pretrial detention lies squarely on the government, and it must prove to this Court that Mr. Arias-Ordonez is a flight risk by preponderance of the evidence. *See Motamedi*, 767 F.2d at 1405; *United States v. Quartermaine*, 913 F.2d 910, 917 (11<sup>th</sup> Cir. 1990). The government's burden of proof in connection with whether or not Mr. Arias-Ordonez is a danger to the community is by clear and convincing evidence. *See* 18 U.S.C. § 3142(f). The factors that should be considered by this Court in determining whether or not the government has

1 met its burden of proof under 18 U.S.C. § 3142(g) are as follows:

2 (1) the nature and circumstances of the offense charged, including whether the offense is  
3 a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled  
4 substance, firearm, explosive or other dangerous device;

5 (2) the weight of the evidence against the person;

6 (3) the history and characteristics of the person, including –

7 (A) the person's character, physical and mental condition, family ties, employment,  
8 financial resources, length of residence in the community, community ties, past conduct, history  
9 relating to drug or alcohol abuse, criminal history, and record concerning appearance at court  
10 proceedings; and

11 (B) whether, at the time of the current offense or arrest, the person was on probation,  
12 on parole, or on other release pending trial, sentencing, appeal, or completion of a sentence for an  
13 offense under Federal, State, or local law; and

14 (4) the nature and seriousness of the danger to any person or the community that would be  
15 posed by the person's release.

16 See 18 U.S.C. § 3142(g). In addition to 18 U.S.C. § 3142(g), however, this Court must  
17 also consider whether or not a defendant's continued detention would violate general principles of  
18 due process. See *United States v. Shareef*, 907 F.Supp. 1482, 1483-1484. (D. Kan. 1995),  
19 reversed on other grounds, *United States v. Shareef*, 100 F.3d 1491 (10th Cir. 1996) ("prolonged  
20 pretrial detention may become excessive and consequently punitive so as to violate the person's  
21 right to due process as guaranteed by the Fifth Amendment to the Constitution")(citing *United*  
22 *States v. Theron*, 792 U.S. 1510 (10th Cir. 1986); *United States v. Zannino*, 798 F.2d 544 (1st Cir.  
23 1986); *United States v. Orena*, 986 F.2d 628 (2nd Cir. 1993)). In *Shareef*, the magistrate court  
24 considered whether three defendants should be released pending the government's appeal of a  
25 motion to suppress the substantive evidence in the case. *Shareef*, 907 F.Supp. at 1483. Along  
26 with the factors listed under 18 U.S.C. § 3142(g), the court also considered the following issues  
related to whether or not the continued detention of the defendants in light of the government's  
interlocutory appeal violated the defendants' due process rights:

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1 The length of detention in this case weighs in favor of release. Defendants  
2 Shareef, Smith, and Brown have been detained for almost nine months. By virtue  
3 of the government's appeal which will delay the disposition of this matter,  
4 defendants may be detained for several more months. The Speedy Trial Act, 18  
5 U.S.C. 3161, requires that the defendants be tried within seventy days of their  
6 initial appearance before a judicial officer of the court in which the charge is  
7 pending, although the Act does provide for certain excludable periods of time,  
8 including delay due to interlocutory appeal. 18 U.S.C. § 3161(h)(1)(E). Among  
9 the purposes of the Act is to assure that persons are brought to trial without delay  
10 which is not of their own making and to minimize the injury which may accrue to a  
11 person who has been incarcerated pending trial but subsequently not found guilty  
12 of a crime. A period of detention equivalent to that already incurred in this case,  
13 without considering future confinement during appeal, could be expected to have a  
14 significant effect on a person's ability to reintegrate into society following release.  
15 This is a matter to be considered by the court.

16 The court believes that it is also appropriate to consider the potential terms of  
17 imprisonment to which the defendants may be sentenced if ultimately found guilty  
18 of the charges as compared to the prospective length of pretrial detention in  
19 determining whether the due process rights of a person may be violated. While the  
20 court is not prepared to calculate with any degree of precision the possible terms of  
21 imprisonment to which these defendants would be subject under the sentencing  
22 guidelines, if convicted, the court has determined that it is possible that a range of  
23 only 18-24 months may be applicable to defendant Shareef. Defendants Smith  
24 and Brown may be subject to terms of imprisonment of 37-46 months. All  
25 defendants may be subject to substantially longer periods of incarceration based  
26 upon facts not immediately available to the court. Notwithstanding, fundamental  
fairness requires that defendants, presumed innocent, not be required to serve a  
major portion of the sentence to which he or she would be subject prior to a  
determination of guilt.

\_\_\_\_\_*Id.* at 1484. In the instant case, the due process issues raised by the *Shareef* court are  
similarly present, and this Court should strongly consider these additional factors in rendering its  
decision on the government's motion.

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1 **II. The Government Has Not Met Its Burden to Establish that Mr. Arias-Ordonez is a**  
2 **Flight Risk**

3 In its motion for detention, the government cites four reasons to attempt to meet its burden  
4 to show that Mr. Arias-Ordonez is a flight risk. Each of the rationales provided by the  
5 government should be rejected by this Court.  
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7 First, the government argues that Mr. Arias-Ordonez is “under an ICE detainer” and that  
8 “if this Court were to release him, he would be deported.” Gov. Mot. at 3:3-4. Yet the fact that  
9 Mr. Arias-Ordonez has a pending ICE detainer does not deprive this Court of the ability to  
10 consider his release. *See United States v. Adomako*, 150 F.Supp.2d 1302, 1304-1307 (M.D. Fla.  
11 2001). In essence, the government erroneously argues that Mr. Arias-Ordonez is a “flight” risk  
12 because he is at risk of deportation – a risk that should not be considered by this Court because it  
13 is of the government’s own creation. The U.S. Attorney’s Office is an executive branch function,  
14 as is the Office of Immigrations and Customs Enforcement. Both offices operate under the  
15 direction and command of the Attorney General, and the government can certainly terminate the  
16 “flight risk” posited by the deportation of Mr. Arias-Ordonez if it so chooses. If this Court  
17 releases Mr. Arias-Ordonez to ICE custody, the government is certainly not powerless to keep Mr.  
18 Arias-Ordonez here in the United States if it so desires. The government has made no showing  
19 whatsoever that Mr. Arias-Ordonez is not eligible for bail before the Immigration Court, and  
20 obviously has the power to order Mr. Arias-Ordonez’ release on bail before that Court. Given its  
21 burden on the question of risk of flight, the factor of the ICE detainer that is ultimately in control  
22 of the government should not be considered by this Court.  
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1 Second, the government argues that “Mr. Arias-Ordonez clearly has no respect for  
2 international borders”, and is accordingly a flight risk. Gov. Mot. at 3:12-13. This argument is  
3 counterintuitive. Mr. Arias-Ordonez’ deportations, while not something to be proud of, obviously  
4 evidence a strong desire to *remain* in the United States - not to *leave* the United States. If  
5 anything, Mr. Arias-Ordonez’ many deportations show a very strong will to live with his family in  
6 Sonoma County, rather than in Mexico. His history does not support the premise that he will flee  
7 to Mexico to avoid the possibility of an additional nine months in custody on a charge of 8 U.S.C.  
8 § 1326.  
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10 Third, the government cites, absent factual support, that an alleged firearms warrant exists  
11 in state court against Mr. Arias-Ordonez. Until the government produces actual evidence on this  
12 warrant, Mr. Arias-Ordonez asks this Court to disregard it; should the government produce it, Mr.  
13 Arias-Ordonez requests additional time to review the basis for the warrant. As the government  
14 admits, Mr. Arias-Ordonez was transferred to ICE custody in November, 2007 *after* alleged  
15 firearms charges were brought by the county of Sonoma in October, 2007. The government’s  
16 statements suggest that Mr. Arias-Ordonez was turned over to ICE custody by the County of  
17 Sonoma, which makes it unlikely that said charges are still pending in Sonoma County.  
18 Jurisdictions attempting to convict defendants at trial ordinarily do not relinquish custody of  
19 defendants to immigration officials until the state court proceedings have concluded. Due to the  
20 dearth of information about said warrant, the Court should not consider it.  
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24 Finally, the government argues that Mr. Arias-Ordonez has failed to appear in state court,  
25 and that he does not have the type of strong family connections that would ensure his appearance  
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1 in Court. Mr. Arias-Ordonez submits that his failures to appear in Court were largely the result of  
2 his deportations to Mexico, which made his appearance in state court physically impossible. With  
3 respect to the government's latter contention, the record belies it. As this Court is already aware  
4 from the dispositive motion briefs, Mr. Arias-Ordonez is supported by a strong family network  
5 including his mother and father, Sofia and Ordonez and Delfino Arias, both legal permanent  
6 residents who scrapped together borrowed funds to pay for Mr. Arias-Ordonez' bail from ICE in  
7 2003. In particular, Ms. Ordonez has attended each and every one of Mr. Arias-Ordonez' court  
8 proceedings, and has conveyed to defense counsel that she, her husband and her daughter Marta  
9 Arias, all of whom work legitimate jobs, will do whatever they can to assure this Court of Mr.  
10 Arias-Ordonez' continued presence in Court, including providing him with a supervised place to  
11 live in Sonoma County and signing on an unsecured bond. Moreover, the Court already has  
12 substantial evidence in its possession that Mr. Arias-Ordonez does seriously live up to his Court  
13 obligations – the documented fact that he voluntarily showed up to be deported in October, 2003  
14 after receiving a certified notice to do so. *See* Falk Declaration to Opening Motion Authenticating  
15 Documents, Exhibit P (notes from ICE automated system, recorded in the ordinary course of  
16 business, documenting Mr. Arias-Ordonez' self-surrender).

20           Considering all of the aforementioned factors, the government has failed to meet its  
21 burden to prove that Mr. Arias-Ordonez would flee this jurisdiction if released.

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1 **III. The Government Has Not Met Its Burden By Clear and Convincing Evidence to**  
2 **Prove that Mr. Arias-Ordonez is a Danger to the Community**

3 The government's evidence on danger to the community is woefully inadequate, and does  
4 not come close to meeting the standard of clear and convincing. As a defendant charged in a 1326  
5 case, Mr. Arias-Ordonez' record is comparatively light. He has only been convicted of one felony  
6 for receiving stolen property – and has no weapons or assault convictions. His other criminal  
7 convictions are misdemeanors - two of which involve driving with a suspended license. This  
8 relatively minor criminal history is reflected in the fact that Mr. Arias-Ordonez' low Guideline  
9 range upon conviction for the instant offense: 15-21 months.  
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11 The government's sole proffer in connection with danger to the community is "a potential  
12 federal firearms offense," about which it has provided no evidence whatsoever. Gov. Mot. at  
13 4:12-13. Given the fact that the Court has no information about the circumstances of these  
14 charges, the extent to which Mr. Arias-Ordonez was allegedly involved, or whether these charges  
15 were dropped and for what reason, the government's proffer does not come close to meeting the  
16 clear and convincing standard. "Clear and convincing" means proof that a particular defendant  
17 actually poses a danger – not that a defendant in theory may pose a danger. *See United States v.*  
18 *Patriarca*, 948 F.2d 789, 792 (1st Cir. 1991). Even assuming Mr. Arias-Ordonez is eligible for  
19 prosecution under 18 U.S.C. §922(g)(1) – a stretch on this record – such a charge is not a crime of  
20 violence categorically, as this Court cannot assume that any weapons possessed by Mr. Arias-  
21 Ordonez were used or possessed for violent activity. *See United States v. Bowers*, 432 F.3d 518,  
22 534 (3rd Cir. 2005)("felon-in-possession does not imply a substantial risk of violence and there is  
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1 not a direct relationship between the offense and the risk of violence.”)(citations omitted). The  
2 government accordingly has not met its burden.

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4 **IV. Significant Due Process Concerns Mandate Mr. Arias-Ordonez’ Release from Federal Custody**

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6 As stated in the Introduction to this opposition brief, Mr. Arias-Ordonez only faces a  
7 Guideline range of 15-21 months if convicted of the offense with which he is initially charged. As  
8 stated by the Shareef court, “fundamental fairness requires that defendants, presumed innocent, not  
9 be required to serve a major portion of the sentence to which he or she would be subject prior to a  
10 determination of guilt.” *Shareef*, 907 F.Supp at 1484. Given the 6 months that Mr. Arias-Ordonez  
11 has already spent in federal custody, any and all addition time he is detained pretrial has a punitive,  
12 rather than a regulatory effect. This is particularly true given the United States’ power to set  
13 conditions of release, both before this Court and before the Immigration Court, if it truly desires to  
14 keep Mr. Arias-Ordonez in the United States for the purposes of prosecution in the unlikely event  
15 that this Court’s order, set forth in detail over the course of three separate legal proceedings and  
16 three rounds of legal briefing and argument – is overturned by the Ninth Circuit. The United States  
17 can also persist in its appeal of the Court’ s legal rulings on the applicability of *Morales-Izquierdo*  
18 and *Diez-Luevano* to the instant case even if Mr. Arias-Ordonez is deported. Given all the  
19 aforementioned factors and the remedies available to the United States that would ensure its  
20 appellate rights as well as Mr. Arias-Ordonez’ due process rights, the government’s motion for  
21 detention pending the notice of appeal that the government claims it will file in the future should  
22 be denied.

**CONCLUSION**

For all the aforementioned reasons, Mr. Arias-Ordonez requests this Court to deny the government's motion for detention pending decision to file a notice of appeal.

Dated: June 2, 2008

Respectfully submitted,  
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/S/

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